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No. 22696

In the

United States Court of Appeals

For the Ninth Circuit

SOUTHWEST FOREST INDUSTRIES, INC., a corporation,

Appellant,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a corporation,

Appellee.

On Appeal from the District Court, District of Arizona

Brief of Appellee

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STATEMENT OF THE CASE

I. Introduction.

Southwest sued Westinghouse for consequential damages allegedly incurred by it as a result of defects in a 25,000 kilowatt turbine generator unit sold by Westinghouse to Southwest. The dollar amount of the claim was large.* Both parties are substantial corporations. Southwest was represented in the lawsuit from its institution in 1963 through its trial in 1967 by a battery of experienced lawyers from a large Phoenix law firm. Few cases have been more exhaustively prepared and presented. Through its trial counsel,

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*The original claim as expressed in the complaint was $11,000,000. It has been refined downward to approximately $2,500,000 by the time of trial.

Southwest selected the legal theories upon which it wished to rely. As the size of the record attests, exhaustive discovery proceedings based on those theories were had. After full factual and legal development on Southwest's original theories, it became evident to Southwest's trial counsel that those theories would probably not suffice to produce the recovery Southwest desired. They therefore, with considerable ingenuity, persuaded the trial court to allow Southwest to abandon its original theories and to adopt a new and more promising one. That necessitated a continuance of the trial and additional discovery. Following that, trial was had. The case was tried on Southwest's new theory. Westinghouse won. Following final judgment, Southwest changed attorneys and theories.

Westinghouse cannot and does not accept either the statement of the issues or the statement of the case as presented by Southwest. In part the theories now asserted on appeal are a reversion to earlier theories abandoned by Southwest before trial and not litigated below. In the main the theories are wholly new and were never suggested until after trial. In many instances, the positions taken by Southwest on this appeal bear little resemblance to the case presented below and many are contrary to express stipulations and concessions of Southwest below. For all of these reasons, it will be necessary for Westinghouse to develop in this brief, in some detail, the true procedural and substantive posture of the case as it was presented below. Because we will have to do so point by point with respect to the seven "Questions Presented" by Southwest, we wish first to make the following preliminary observations which will be developed in greater detail later:

1. (Relative to Southwest's Questions Presented I and II). Except with respect to the theory of strict liability in tort, this is not a summary judgment case at all. The critical issues in the case, as presented to the trial court under the

theory selected by Southwest, were submitted to the court for final determination one way or the other pursuant to an express stipulation of the parties that the issues were issues of law, that the issues should be decided by the court, that the facts were undisputed, and that neither side had any additional evidence of any type bearing on those issues.

2. (Relative to Southwest's Question Presented III). At no time prior to final judgment did Southwest put in issue the alleged unconscionability of the Westinghouse exclusion of consequential damages, a theory that was immaterial under Southwest's primary theory of the case at trial.

3. (Relative to Southwest's Question Presented IV). At no time below did Southwest contend that Westinghouse was liable for negligent manufacture or repair on a pure tort theory independent on any duty created by the contract between the parties.

4. (Relative to Southwest's Question Presented V). Southwest conceded throughout and in fact stipulated that the damages it was claiming were legally termed "consequential." At no time prior to final judgment did Southwest assert its theory that some of its damages were legally termed "incidental."

5. (Relative to Southwest's Question Presented VI). The question of whether the trial court committed error in granting summary judgment on Southwest's theory of strict liability in tort is properly here for review and decision.

6. (Relative to Southwest's Question Presented VII). At no time below did Southwest contend that the exclusion of consequential damages contained in the Westinghouse warranty was ineffective because it failed to comply with the Uniform Commercial Code requirements for the disclaimer of all warranties.

II. Background of the Case and Development of the Litigation from 1963 Until Southwest Changed Its Theory on August 2, 1967.

Between 1955 and 1959 Southwest, through independent consulting experts, conducted studies to determine the feasibility of building and operating a pulp and paper mill on land owned by it in Arizona (A.T. 94).* Upon completing these studies, Southwest determined to proceed with the project and entered into an engineering and construction contract with Rust Engineering Company (hereafter "Rust"), a large engineering firm headquartered in Pittsburgh (Ex. 1, App. 2-11). Under this turnkey contract, Rust was to design and construct the entire mill, and had full responsibility for purchasing all necessary materials, machinery and equipment for it. The Southwest-Rust contract specifically required Rust to obtain for Southwest appropriate warranties from manufacturers of the equipment to be purchased (Ex. 1, Art. I, para. C-10, App., p. 4). For performing its services, Rust was to receive a fixed fee of $1,500,000 plus 25% of any savings realized if it succeeded in building the mill for less than the guaranteed maximum price to Southwest of $32,334,500.

Rust proceeded to design the mill. It determined what equipment was necessary for the entire mill and prepared specifications for such equipment. One piece of equipment determined to be necessary was a 25,000 kilowatt turbine

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*References to "A.T." are to the Appeal Transcript which is in two volumes consecutively paginated and which covers proceedings of August 8, 9, 10 and 11, 1967. Seven separate volumes of Reporter's Transcript are part of the record, cover pretrial and post-trial matters, and are individually paginated. They will be referred to by the abbreviation "T." and the date of the volume, *e.g.*, T. Aug. 1, p. 10. References to exhibits will be by exhibit number and, where appropriate, by parallel citations to the appellant's appendix where the exhibit is reproduced. Reference to that appendix will be "App." References to the reproduced record, consisting of three volumes, consecutively paginated, will be to "R."

generator. Having determined the specifications it desired for it, Rust sent to Westinghouse an invitation to bid on the unit.* In response to that invitation, Westinghouse, on May 18, 1960, submitted a formal proposal on the unit. Rust and Southwest decided to purchase the unit from Westinghouse. After Westinghouse received the order, it built the unit in Pittsburgh and Philadelphia during the balance of 1960 and the first half of 1961. It was shipped to Arizona during the summer of 1961 and installed by Rust by October, 1961. The pulp and paper mill began operation in November, 1961.

Southwest claimed that it had trouble with the unit during the early stages of the mill's operation. It sued Westinghouse on December 17, 1963 alleging that the turbine generator unit was defective. Southwest's original complaint alleged two legal theories: negligence and breach of warranty. Relatively early in the case, Westinghouse propounded interrogatories to Southwest seeking its "understanding of any warranty extended by Westinghouse concerning the purchase and sale of the steam turbine" (R. 25). In the face of Southwest's objection that the interrogatories were "too vague and indefinite" and called for "legal conclusions" (R. 29), the trial court amended the interrogatory so that Southwest could respond by supplying "a copy of the document or documents which plaintiff considers to contain the terms of the warranty in question." (R. 46). Southwest then submitted two documents. One was the turbine generator specifications prepared by Rust on April 14, 1960 and submitted by Rust to Westinghouse as part of its invitation to bid of May 3, 1960 (R. 139-141). The other document submitted by Southwest was

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*Rust submitted a similar invitation to at least one other manufacturer of turbine generators, General Electric (A.T. 154).

the Westinghouse proposal of May 18, 1960 (R. 143-146), which contains what is now known in this case as the "Westinghouse warranty." It states:

> "WARRANTY—Westinghouse, in connection with apparatus sold hereunder, agrees to correct any defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment, by repair or replacement f.o.b. factory of the defective part or parts, and such correction shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages."

These answers to interrogatories were sworn to by a senior executive of Southwest, Raymond E. Baker, Executive Vice President in charge of Southwest's Paper Products Group and the man with overall responsibility for the mill at all times (R. 80).

These answers were filed on August 17, 1964. From then until August 1, 1967, the scheduled trial date, the parties proceeded on the basis of Southwest's response. Westinghouse did not know, of course, precisely how Southwest would present its contention that the governing warranty was in the Rust specifications and the Westinghouse proposal, but since Westinghouse's position was that its warranty in its proposal of May 18, 1960 governed the case, the parties were at least in agreement as to what documents were important.

All discovery proceedings, which were very extensive, proceeded on the basis that the documents containing the governing warranty were not in dispute. Therefore, discovery was directed toward other matters, such as the nature, extent and method of computation of Southwest's damages, the design, construction, installation, repair and

operation not only of the turbine generator unit but of the entire mill and innumerable other matters relating to design and operational difficulties of the mill during the start-up period.

In 1966, Southwest added a count to its complaint alleging that a portion of the unit known as an "exciter" had malfunctioned in July, 1964, more than two and a half years after its installation (R. 639-40). Consequential damages of $150,000 were claimed. Also in 1966, Southwest amended its complaint to add a count to "take advantage of the newly recognized doctrine of 'strict liability in tort.' " (R. 648). It was established by interrogatory that Southwest claimed the same defects and the same items of damage with respect to this theory as it did with respect to its original theories of breach of warranty and negligence (R. 677).

After discovery was substantially completed, Westinghouse filed two separate motions for partial summary judgment. One contended that the strict liability in tort theory did not apply to the case so as to enable Southwest to recover its claimed economic consequential damages (R. 700-719). The second motion was directed to Southwest's warranty theory, the contention of the motion being that the warranty in the Westinghouse proposal of May 18, 1960, by its express terms barred recovery of consequential damages (R. 720-32). Pretrial conference was set for July 24, 1967. A few days before that, counsel for the parties met pursuant to court order to exchange lists of witnesses and exhibits and to prepare a joint pretrial statement. In that statement, Southwest, in the face of the pending motion on the warranty count and in apparent recognition that the Westinghouse warranty did in fact bar consequential damages, voluntarily abandoned its war-

ranty count and elected to rely upon its theories of negligence and strict liability in tort (R. 751-53). A "clean draft" complaint alleging only those two theories was submitted at the pretrial conference by Southwest (R. 777).

At the pretrial the court granted Westinghouse's motion for partial summary judgment directed to Southwest's theory of strict liability in tort (R. 981). This left Southwest's negligence claim on both the basic unit and the exciter which the court set for trial for August 1. Since Southwest had voluntarily dropped its warranty count, it requested and was granted leave to amend its answers to interrogatories concerning damages and Westinghouse was granted leave to redepose Southwest's principal damage witness after the pretrial. (R. 786). That witness, the Comptroller of Southwest, was redeposed on July 25. On July 26 Southwest filed its amended answers to interrogatories on damages, reducing its claim to approximately $2,500,000 (R. 789).

Following completion of this additional discovery relating to damages, Westinghouse filed a motion for summary judgment directed to Southwest's sole remaining theory—negligence. This motion asserted that, under Pennsylvania law, the exclusion of consequential damages contained in the Westinghouse warranty barred recovery on Southwest's negligence theory. Late in the day the day before the case was set for trial, Southwest filed and served a motion to amend its complaint to reallege the warranty theory previously withdrawn by it (R. 848) and the proposed amended complaint itself (R. 880-81). Southwest simultaneously dropped the bombshell around which most future proceedings revolved. It filed an "Amended Answer to Interrogatory Nos. 28 and 29," (relating to the warranty documents) asserting for the first time that the "warranty

extended by Westinghouse in its sale of the steam turbine is contained in the purchase order for the said unit issued by Southwest Forest Industries, Inc. and accepted by Westinghouse" (R. 850). If the governing warranty was in fact contained in the Southwest purchase order, a whole new lawsuit was about to begin because its terms were:

> "The materials to be furnished hereunder shall comply with the plans and specifications furnished to the Vendor by the Purchaser or Engineer. The Vendor warrants the proper quality, character, adequacy, suitability and workability of the materials. The Vendor and the materials furnished hereunder are subject to the approval of the Engineer. The Vendor agrees to indemnify the Purchaser and Engineer against all loss or damage arising from any defect in materials furnished hereunder." (Ex. 2-A, App. p. 27).

Since these developments occurred at 4:45 p.m. the night before the scheduled trial, counsel met with the court in the morning. The jury was excused and counsel, on August 1 and 2, presented arguments on Southwest's motion to reallege its warranty count and to amend its interrogatories to insert a wholly new warranty document into the case, which warranty was unlimited in type of damage recoverable and unlimited even in point of time. Westinghouse vigorously opposed the motions, pointing out that Southwest itself years earlier had selected the documents upon which it relied as containing the governing warranty, that all discovery had proceeded on that basis, and that Southwest had itself voluntarily abandoned its warranty count in the face of a motion for summary judgment directed to it. Westinghouse argued that the motion was untimely, would broaden the issues in the case and would require additional discovery.

Southwest argued in support of its motion that putting the warranty count back in really added nothing to the case, since Southwest would have to prove a contract under its negligence count anyway to create any duty running from Westinghouse to Southwest (T. Aug. 1, p. 3, 4), that the Southwest purchase order of July 6, 1960, was in fact the contract which existed between the parties rather than the Westinghouse proposal of May 18, 1960 (*Id.*, p. 5) and that under the terms of its purchase order Southwest was entitled to recover consequential damages (*Id.*, p. 6). Counsel for Southwest argued that Southwest should not be penalized if its counsel had misunderstood which contract existed between the parties.* (T. Aug. 2, p. 15-16).

Southwest also argued that the amendment would not change the character of the damages being sought, stating: "They obviously are consequential and have been all along" and "the damages claimed are those damages which the courts characterize as consequential damages." (T. Aug. 1, p. 21-22). Southwest's counsel, obviously recognizing that Southwest could not recover under its negligence theory if the Westinghouse warranty applied argued that "for this case to be terminated at this point because of a mistake in the answer to interrogatory would not be performing justice." (*Id.*, p. 23). Southwest's counsel expressly stated for the record that Southwest would rely on a contract to create a duty running from Westinghouse to Southwest (*Id.*, p. 28).

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*This argument was made even though the answers to interrogatories which stated that Southwest relied upon the Westinghouse warranty were verified in 1964 by Raymond E. Baker, Executive Vice President of Southwest in charge of the Paper Products Group who, at that time, swore that the answers to interrogatories were prepared under his supervision, that he had read the exhibits attached to them (which included the Westinghouse warranty marked with an "X") (R. 144), and that the answers were true and correct to the best of his knowledge, information and belief (R. 80).

The trial court was deeply troubled by the motions. It recognized that Southwest was now asserting a contractual basis for its claim entirely different from the "agreements of parties and everything from the very beginning" (T. Aug. 2, p. 17) making the case "a substantially different lawsuit" (*Id.*, p. 18). But the trial court finally determined to grant the motion (*Id.*, p. 20). The deciding factor was the court's belief that a litigant should not be penalized for counsel's error (*Id.*, p. 19). Had the court then known what everyone later learned, *i.e.*, that Southwest's own executives had always considered the applicable warranty to be the Westinghouse warranty and had in fact submitted the Westinghouse warranty to former counsel for an opinion when the matter first came up (a fact unknown to Southwest's trial counsel until Westinghouse discovered such proof in Southwest's records during trial), it undoubtedly would have denied the motion and the litigation would have been terminated at that point.

Since Southwest's new theory made additional discovery necessary, the court continued the trial for several days to allow the parties to take more depositions in Pittsburgh and Phoenix. The parties then set about to establish, through discovery, all of the facts relative to Southwest's new theory. The gathering of all those facts was not completed until the second day of the trial itself, a fact which is important in understanding the procedural posture of this case.

III. Developments Between Southwest's Change of Theory on August 2 and the Commencement of Trial on August 8.

The depositions in Pittsburgh and Phoenix the next few days concentrated on attempting to develop all the testimony and to trace all the documents relevant to the now critical question: was the Westinghouse warranty of May 18, 1960,

the contract of the parties or was the warranty on the Southwest purchase order of July 6, 1960, the contract of the parties? The facts developed as follows:

Chronologically the first document in the chain was the Rust invitation to bid which was sent by Rust to Westinghouse on May 3, 1960. Rust, of course, had agreed to obtain for Southwest appropriate warranties on all equipment purchased for the mill. Amazingly, this first document is not even mentioned in Southwest's opening brief. While it is not itself one of the contract documents, it is highly relevant in establishing Rust's expectations and the usual warranties provided in the industry. It contained the following provision, which had been specially prepared by Rust for use with all its invitations to bid on the entire Southwest project (Ruyak Depo., p. 58).

> "13. GUARANTEE: Supplier shall be required to guarantee the performance of his equipment and the material furnished to the extent that he shall replace, f.o.b. jobsite, without additional cost to the owner, any unsuited to the purpose intended during the first year of use of same in active service, upon notice by the engineers or owner." (Ex. CCC, p. 2, para. 13).

It was in response to this invitation that Westinghouse, on May 18, 1960, submitted its formal proposal (Ex. DDD, App. 12-16). It has been quoted above and, as noted, provides for repair or replacement of defective parts for a one-year period and excludes consequential damages.

The proposal included provision for a Westinghouse engineer to provide technical advice when the unit was installed. The warranty for that service was spelled out in the proposal and also excluded liability for consequential damages (Ex. DDD, p. 5B).

On June 6, 1960, Rust sent to Westinghouse a letter of intent. It read:

"SUBJECT: SOUTHWEST FOREST INDUSTRIES, INC.
25,000 KW TURBINE-GENERATOR
WESTINGHOUSE REFERENCE #60203

"Gentlemen:

"It is the intention of Southwest Forest Industries, Inc., as soon as practicably possible, to issue a formal order to cover the purchase of one 25,000 kw turbine-generator unit, generally in accordance with your above referenced proposal.

"However, in the interim, please accept this letter of intent as your authorization to proceed establishing this date as the order date for determination of delivery for the turbine-generator, which we understand had been established for approximately 13½ months." (Ex. EEE, App. 17).

Upon receipt of this letter of intent, Westinghouse prepared its General Order, which was assigned number 88081. This is the document used by Westinghouse formally to write up and to acknowledge an order from a customer. Several copies are made on a preprinted set. One of these copies is called a "25" and is the customer's acknowledgment copy (Ex. Y-1, App. 18-21). It advises the customer that the order has been entered under a particular number, requests the customer to use that number in all future communications relating to the order, and, most importantly for purposes of this case, restates the Westinghouse warranty in the precise terms as that which were included in the Westinghouse proposal of May 18, 1960 (Ex. Y-1, App. 19). Westinghouse personnel in Pittsburgh testified that Copy 25 was sent by Westinghouse to Rust when the General Order was prepared (Depo. of Suto, pp. 12-13, Depo. of Rice, pp. 18-19).

Westinghouse naturally desired to establish that Copy 25 had in fact been received by Rust. This attempt failed in Pittsburgh when two Rust executives testified that Rust's

entire purchasing file relating to the turbine generator unit had recently disappeared and could not be located (Steenhill Depo., p. 11; Ruyak Depo., pp. 8-9).

The next document that was exchanged between Rust and Westinghouse was the Southwest purchase order of July 6, 1960, which is the document Southwest contended formed the contract between the parties (Ex. 2-A, App. 26-29). It was prepared by Rust and signed by a Mr. Staley, who had earlier been appointed Southwest's purchasing agent by written document executed by Southwest (Ex. KKK, App. 22-23). The purchase order states that the unit shall be "in accordance with The Rust Engineering Company's specification EQ-6 [which accompanied the Rust invitation to bid of May 3, 1960] and Westinghouse Electric Corporation's proposal dated May 18, 1960." It also states: "Confirming 'Letter of Intent' dated June 6, 1960 to Mr. J. J. Sherman—*DO NOT DUPLICATE.*" (Ex. KKK, App. 25). On the reverse side of the purchase order is printed the "Southwest warranty." It has previously been quoted. Basically it is an open-ended indemnification clause without limitation in time or type of damage.

At the bottom of the purchase order there is contained a space for the vendor to sign under the legend:

> "ACKNOWLEDGMENT"
>
> "The foregoing order is hereby accepted by the Vendor subject to all the terms and conditions set forth herein." (Ex. 2-A, App. 26).

The Southwest purchase order was received by Westinghouse and was handled by J. J. Rice, a Westinghouse order correspondent. After obtaining verification of a shipping date from the Westinghouse factory, he wrote on the face of the purchase order (not in the space for acknowledgment) "Will ship w/o [week of] 7/10/61, J. J. Rice 8/9/60" (Rice

Depo., p. 20, Ex. 2A, App. 26). He did not sign the acknowledgment. Instead, he stamped on the face of the purchase order the following:

> "Order PG88081*
>
> "In referring to this order please use this number as a reference.
>
> "Order accepted subject to conditions outlined in W. E. Corp. form of acknowledgment." (Ex. 2A, App. 26).

Mr. Rice testified this stamp was placed on the purchase order to do exactly what it says: tell the customer the order is accepted subject to the conditions in the Westinghouse form of acknowledgment (Rice Depo., p. 21). The word "attached" was crossed out by Mr. Rice because the Westinghouse acknowledgment form (Copy 25) had already been sent to Rust on June 13, 1960, when the order had been written up following receipt by Westinghouse of the letter of intent. On four occasions after the purchase order of July 6, 1960, Southwest purchase orders were again issued by Rust and sent to Westinghouse to reflect amendments and revisions of the original order. All of these were handled in precisely the same way as the original purchase order. Each was stamped with the same stamp, the word "attached" was crossed out on each, and each was returned to Rust with the space for acknowledgment left blank (See Ex. 2A, App. 30, 31, 35, 36). In each of the revisions which Rust prepared Rust expressly stated that all the other terms and conditions of the original order remained the same (Ex. 2A, App. 30, 34, 35, 36). In addition, one substitute Southwest purchase order was issued which deleted pages 4-B and 5-B of the Westinghouse proposal (relating to technical services of a Westinghouse engineer). Pages 4-B and 5-B

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*Mr. Rice wrote in the order number, which was not part of the stamp.

became the subject of a separate Rust purchase order (Ex. XXX, App. 37). Page 5-B contained the Westinghouse warranty for services which, like the warranty on the sale of the equipment, also excluded consequential damages.

While the depositions of the two Rust executives in Pittsburgh were not as productive as they might have been if Rust's purchasing file on the turbine generator unit had not disappeared, certain relevant facts were established which became significant later in the trial court's ruling.

Mr. Steenhill, Rust Project Manager for the Southwest job, testified that he was sure that copies of all contract documents were transmitted to Southwest at the time they were being exchanged between Rust and Westinghouse (Steenhill Depo., p. 12). Very significant was the fact that he also testified that he, in 1963, at the specific request of Baker of Southwest, had requested Westinghouse to extend its *one-year warranty* until July 1963 because Southwest was unable to schedule its first annual shutdown until then (Steenhill Depo., p. 13-16). Westinghouse's response to the request was that it would take responsibility for the replacement of parts, if any, found defective on the July, 1963, teardown, if defects were found to be clearly due to design, material or workmanship, but that it could not depart from the usual one-year warranty and accept responsibility for Southwest's mode of operation (Ex. 3 of Steenhill Depo.).

Mr. Ruyak, the Senior Buyer for Rust, was also deposed. He had formerly been employed for seven years by Westinghouse. The majority of his Westinghouse employment was in the purchasing department, where he was responsible for the purchase of all process machinery and equipment for one division of Westinghouse. (Ruyak Depo., p. 4-5). He was fully aware of the normal Westinghouse terms and conditions (Id., pp. 12, 83-84). He testified that the provision

in the Rust invitation to bid calling upon bidders to agree to replace parts for a one-year period was prepared by Rust and was submitted to all prospective bidders, including Westinghouse (Id. p. 84). He prepared the letter of intent of June 6, 1960, the Southwest purchase order of July 6, 1960, and all the later revisions to it. Upon receipt of a proposal from a vendor, it was his responsibility to determine whether there were any variances between the vendor's terms and conditions and those required by the purchaser (Id. p. 40). Specifically, it was part of his job to see to it that the vendor's terms and conditions met the requirements of Rust's contract with Southwest. If there were conflicting terms, he was to refer the matter to Rust's legal department (Id., p. 40). Had there been any variance in this particular case, the normal routine would be to resolve it in conference with the Westinghouse sales engineer and the Rust legal department (Id., p. 77). On no occasion did Rust or Southwest make any inquiry of Westinghouse or express any questions relative to the Westinghouse terms and conditions in this case.

Additionally, Ruyak conceded that, on a number of occasions, he had seen purchase orders returned from Westinghouse with the Westinghouse stamp affixed and the word "attached" crossed out (Id., pp. 78-79). However, since the file on this particular purchase had disappeared, he could not recall whether this had occurred on this particular purchase order. In the absence of his file, he stated that he believed the Southwest purchase orders were returned by Westinghouse directly to Southwest (Id., pp. 41-42), although Westinghouse personnel testified positively that the stamped purchase orders were returned to Rust.

By this point, it was obvious that two documents assumed considerable importance. The first was "Copy 25," the order acknowledgment form, prepared by Westinghouse following

receipt of the Rust letter of intent. This was important because it showed Westinghouse considered the letter of intent as an order and because its return to Rust restated the Westinghouse warranty in the same terms as the Westinghouse proposal of May 18, 1960, to which the Rust letter of intent had responded. The Westinghouse testimony was that Copy 25 had been sent to Rust on June 13, 1960. Rust said its file was lost and it did not know if it had received Copy 25 (Id., p. 17, 24). The other important document was the Southwest purchase order stamped by Westinghouse which a) indicated that the order remained subject to the terms of the Westinghouse warranty as restated in Copy 25 and b) expressly declined to acknowledge or accept any of the other terms or conditions contained in the Southwest purchase order. While Southwest had earlier produced, in connection with its motion to change theories, a stamped copy of the purchase order,* the testimony was ambiguous as to whom the stamped copy was sent. Westinghouse said it was sent to Rust with whom all Westinghouse dealings had been. Rust, again pleading absence of specific knowledge because of the fact the file was missing, claimed it believed the purchase orders were returned by Westinghouse directly to Southwest.

On this point, the parties moved back to Phoenix where Mr. Baker, Executive Vice President of Southwest, was again deposed on August 7. He denied that he maintained any file or record whatsoever relating to purchases for the mill or of any correspondence relative to such purchases (Baker Depo., Aug. 7, p. 5). He testified that the Southwest purchasing department files had originally been maintained by a Mr. McBride who had since retired and whose where-

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*Westinghouse had no stamped copy in its possession—the Westinghouse testimony being that the stamped copy was returned to Rust.

abouts were unknown to him. He further testified that the purchasing files which had been maintained by McBride for 1960-61 had been destroyed (Id., p. 5). He denied ever recalling seeing a copy of the Southwest purchase order stamped by Westinghouse, or of any of the revisions thereto, although he acknowledged Revisions #2 and 4 bore his personal "Received" stamp and Revision 3 bore notes in his personal handwriting (Id., pp. 7-8). On this note, the additional pretrial discovery necessitated by Southwest's new theory was concluded.

On August 2, after Southwest had reinstated its warranty count under its new theory, Westinghouse had renewed its earlier motion for summary judgment which had been made moot when Southwest abandoned its first warranty count. The renewed motion was argued on August 7. On that date, Southwest filed, in opposition to the motion, an affidavit of Baker in which he swore that page 2 of the Rust invitation for bids (requesting vendors to include in any proposals a one-year warranty for the replacement of defective parts) "definitely" was not included as part of Rust's invitation to Westinghouse to bid on the turbine generator (R. 959-60).

Southwest then argued in opposition to the motion for summary judgment that there was a dispute between the parties as to what the contract was, that the Baker affidavit created an issue of fact as to whether page 2 was included with the Rust invitation to bid, that the Ruyak deposition indicated that he, Ruyak, did not consider that Rust had a firm deal until a purchase order was returned accepted by the vendor, that Westinghouse in fact had acknowledged, signed and returned the purchase order, that Westinghouse could not modify a proposed contract when it failed to attach the modifying document, that the stamped purchase order went to Southwest and not to Rust, and that the court would

Steenhill of Rust to Baker of Southwest on March 27, 1962, and that copies were distributed to several individuals, including Southwest's attorney at that time. Exhibit Y-2, also produced from the Southwest files, was a Southwest inter-office memorandum from Fates to Baker dated April 9, 1962, reflecting the results of a meeting held between Southwest, its then counsel, and its insurance agent, which refers to the Westinghouse order acknowledgment and quotes the language of the warranty contained therein. It should be noted that these documents are all dated well in advance of Southwest's request to Westinghouse to extend its one-year warranty.

Baker had clearly been severely impeached. His present admissions, compared with his previous testimony, together with the production of the critical documents from Southwest's own file, were highly important. The jury, of course, had heard and observed this impeachment and had observed that the critical documents had now been dragged out of Southwest's own files. Besides this, it now became clear that Southwest's own executives had been responsible for Southwest's long reliance on the Westinghouse warranty, a fact at odds with Southwest's last minute plea to the court that it should not be penalized merely because its trial counsel had been in error in their understanding of the terms of the contract.*

Southwest and its trial counsel had some decisions to make. If Southwest could convince the court as a matter

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*We wish to make clear that we do not impugn the integrity of Southwest's trial counsel in the slightest. There is no hint that Southwest ever advised them of their earlier review of the contract documents and of their submission to prior counsel. There is also no hint that trial counsel knew the Southwest file had not in fact been destroyed, that Baker had in fact kept a personal file or that Southwest's files showed Rust had received Westinghouse's Copy 25 and sent it to Southwest until these facts were disclosed by Westinghouse's search of the files finally produced by the subpoena.

of law that, under the facts as now developed, the terms of the Southwest purchase order became the contract of the parties, it could proceed with its case. If it could not so convince the court, there was no reason to proceed with what promised to be an extremely long, technical and expensive trial. It was at this point in the case that Southwest's counsel requested a bench conference (A.T. 220). This led to an agreement between the parties and the court that the court should, at this point in the case, decide the critical issue of which warranty applied and of its legal effect. It was Southwest's counsel who first used the expression "renewed motion for summary judgment" which present counsel seizes upon. Following the bench conference, Southwest counsel advised the court that Westinghouse counsel had indicated a desire

> "to renew his motion for summary judgment at this time, and on behalf of the plaintiff, I have agreed that it is appropriate that it be done at this time since I believe that the issues he raises are legal ones and that there is sufficient uncontradicted evidence in the record from which a determination of those legal issues can be made." (A.T. 222-23).

Notwithstanding some of Southwest's present contentions, there is no reasonable doubt the positions of the parties had crystalized: Southwest relied principally upon the theory that the terms and conditions of the Southwest purchase order of July 7, 1960 governed the case. Alternatively, Southwest contended that if the Westinghouse warranty governed, its terms should not be held to bar Southwest's claim under Pennsylvania law. Westinghouse, on the other hand, contended that its warranty provisions governed and that its terms under Pennsylvania law excluded consequential damages both on a warranty theory

and on a negligent breach of warranty theory. It was understood by all involved that if the court ruled in favor of Westinghouse on both questions being submitted, the case was over. Southwest did not then urge any independent tort theory, as distinguished from a negligent breach of a duty created by contract. This is made clear by several passages in the record.

Southwest's counsel stated that "there is a dispute which we believe is a legal one about which if any warranty provision is effective to control the contractual relationship between the parties." (A.T. 223). Southwest's counsel suggested that counsel meet and prepare a written statement of "the two issues of law which are to be presented to the court." (A.T. 221). Those questions ultimately were stated by the court in its order and judgment (R. 1009) to be:

> "First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> "Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?"

Counsel for Westinghouse requested that the memoranda filed in connection with the earlier motions for summary judgment be considered by the court in its resolution of the issues now being submitted to it for decision. The parties then very carefully supplemented the record by stipulating into it every additional document and deposition which they wished the court to consider in deciding the two agreed questions (A.T. 224-27).

The court then adjourned until the next day so counsel could prepare their arguments and so the court could review the transcripts, depositions, and exhibits which the parties had stipulated should be considered by the court.

At the beginning of argument the next day the following colloquy occurred:

> "The Court: Before we start, just to make sure that on any review the record is perfectly clear, following the request and discussion with counsel, that's on the record for yesterday afternoon, the defendant has renewed its motion for summary judgment on all portions of the complaint as presently amended and before the court other than the anti-trust count and the plaintiff concurs in this procedure; is that correct?
>
> "Mr. Perry: [lead trial counsel for Southwest] That is correct, your Honor.
>
> "The Court: And the motion before the court is based on the trial record to date, the exhibits and depositions that were heretofore specified in the record by counsel?
>
> "Mr. Perry: That is correct.
>
> "The Court: And the parties agree that there exists no dispute as to any material fact necessary to decide the legal issues of what constitutes the contract warranty and whether the defendant is liable thereunder for the claimed consequential damages; is that correct?
>
> "Mr. Perry: That is correct.
>
> "The Court: The parties agree that the specified exhibits are genuine in that they are what they purport to be and the only question is as to their legal significance in connection with the motion for summary judgment; is that correct?
>
> "Mr. Perry: That is correct.
>
> "The Court: And that neither side has any evidence to present contradicting or impeaching any of the testimony in the specified depositions; is that correct?
>
> "Mr. Perry: That is correct." (A.T. 229-30).

Counsel then argued the case. In light of the stipulation, Southwest of course did not argue that there were ques-

tions of fact requiring jury determination as it now does on appeal. Southwest argued that its warranty applied. Westinghouse argued that its warranty applied. Whichever way the court ruled, the decision would be binding on both parties, since each had stipulated to a resolution of the issues at this stage of the trial and had no more evidence. At the conclusion of the argument and having considered the stipulated record, the court concluded that the minds of the parties had met on the Westinghouse form of warranty and that that warranty barred Southwest's claim for consequential damages under Pennsylvania law. Thereafter, the court entered a formal order and judgment (R. 1008-1010) as well as a detailed opinion, explaining the reasons for its decision (R. 978-1007).

V. Southwest's Change of Attorneys and Change of Theories After the Trial.

The opinion and judgment were filed September 8, 1967. On September 15, Southwest changed attorneys. On September 18, Southwest's new attorneys filed a motion to alter and amend the judgment. In it, Southwest disavowed its earlier stipulation that the question of which warranty applied was one of law and argued that it was one of fact. It also disavowed its stipulation that the facts were undisputed and argued that there was a question of fact. Then, seizing upon the term "renewed motion for summary judgment" and ignoring the plain fact that the issues were submitted for decision by the court one way or the other, Southwest argued that the court had erred in ruling for Westinghouse since the alleged factual disputes barred summary judgment. Additionally, the motion asserted for the first time, contrary to all earlier proceedings and a stipulation of the parties, that Southwest's claimed damages

were not "consequential" after all, but were "incidental" so as not to be barred by the terms of the Westinghouse warranty. The third new argument advanced, which also had never been presented to the trial court, was that the Westinghouse warranty was unconscionable.

The motion to alter and amend was extensively briefed and argued. After a thorough review of the record and all the prior proceedings, the trial court concluded that there was nothing in the stipulated record from which a reasonable person could even draw an inference other than that the Westinghouse warranty applied, and therefore it was immaterial whether the stipulated proceeding was treated as a request for an interlocutory summary adjudication or as a trial to the court with a waiver of a jury finding. (T. Dec. 4, p. 24). The court also noted that Southwest itself had at all times characterized its damages as consequential throughout all proceedings, that the question of unconscionability had not been raised before judgment, and that

> "in the context of this case these facts and these parties, the court could not say that there was a question of unconscionability upon which evidence should be taken particularly in the absence of any offer or claim by counsel to that effect." (T. Dec. 4, p. 26).

The court thereupon denied the motion. This appeal followed.

ARGUMENT

I. Southwest Stipulated That the Issues of Which Warranty Governed and of Its Legal Effect Were Questions of Law to Be Determined by the Court and That There Were No Issues of Fact and Cannot Now Claim That There Were Fact Issues Which Should Have Been Resolved by the Jury.

Southwest's Questions Presented Nos. I and II are interrelated and will be dealt with together. As phrased by Southwest those questions are:

> "I. Can a court properly grant a motion for summary judgment to the moving party, when the moving party on a motion for summary judgment fails to establish that there are no genuine issues as to material facts?"
>
> "II. Was there a meeting of the minds of Southwest and Westinghouse on all of the terms and conditions set forth in the Westinghouse offer and the Southwest acceptance?"

The phrasing of these questions simply ignores everything that occurred in the trial court. If anything in this case is clear it is that the parties, by express stipulation, submitted the following two questions to the court for determination by the court upon an agreed record of testimony, depositions and exhibits:

> "First: What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?
>
> "Second: Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?" (R. 1009).

The court, in deciding these stipulated questions, held that there was a meeting of the minds on the Westinghouse warranty and that the legal effect of the Westinghouse warranty, under Pennsylvania law, barred Southwest's claim for consequential damages. We have set forth at some length the procedural history of this case because, we submit, it demolishes Southwest's argument that this is a summary judgment case. It is quite true that there were references to a "renewal" of a motion for summary judgment, but such an understandable misnomer should not now entitle Southwest to repudiate its stipulations and ignore the record of what actually occurred. Since the issue had once been briefed and argued in the form of a motion for

summary judgment, and since the parties requested the court to consider the same memoranda that had been filed in connection with the motion, it is not surprising that the term "renewal of a motion for summary judgment" was used. What is surprising is that Southwest could now dispute the plain fact that both parties put in all the evidence they had on the critical issue and specifically requested the court to decide the issue one way or the other. It was a perfectly sensible thing to do. The trial had reached a point where all available evidence on the question was in or could easily be put in by stipulation. This was done. A lengthy trial was fruitless and expensive if the court was going to accept Westinghouse's arguments.

The position of the parties was clear. Southwest claimed its warranty applied. Westinghouse claimed its warranty applied. Had the court held that the Southwest warranty applied, Westinghouse would have been bound by the ruling for the rest of the trial since it, like Southwest, had stipulated it had no more evidence on the issue. Even after the court had ruled and Westinghouse submitted a proposed form of judgment Southwest did not, in its objections to the judgment, contend that the procedure was improper or that there was an issue of fact requiring jury determination (R. 976).

The court and the parties would hardly take time out in the middle of a trial to excuse the jury, enter into elaborate stipulations, and supplement the record with exhibits and depositions if the only purpose was to re-urge a motion for summary judgment which had once been denied. Had Southwest felt at the time that the question was one of fact for the jury, the whole proceeding could not possibly have occurred. Southwest would simply have proceeded with the presentation of its case and Westinghouse would have been powerless to raise the issue until plaintiff had rested.

This case is strikingly similar to *Gillespie v. Norris,* 231 F. 2d 881 (9th Cir. 1956). There both parties moved for summary judgment. At the hearing on the motions, evidentiary matters were submitted and considered by the court. The parties acquiesced in this procedure. Each side argued its respective position and neither side claimed that there were issues of fact. The court entered judgment for one party, calling it a "summary judgment" because of the manner in which it had first been presented to the court. On appeal, the losing party did exactly what Southwest is doing in this case. It retreated from its original position that its view should have prevailed and argued instead that there was an issue of fact which precluded summary judgment for the other side. This Court held that the claim came too late. The parties had acquiesced in a procedure which was in actuality a trial to the court. Here Southwest not merely acquiesced in the procedure, it suggested it to the court and *stipulated* to it.

The First Circuit was presented with a similar situation in *Demelle v. ICC,* 219 F. 2d 619 (1st Cir. 1955), *cert. denied* 350 U.S. 824, 76 S. Ct. 52, 100 L.Ed. 736 (1955). That case turned upon an interpretation of an ICC certificate. Each party had his own view of the proper interpretation. Plaintiff moved for summary judgment. Defendant stipulated there was no issue of fact but urged that his interpretation of the certificate be accepted by the court. The trial court accepted plaintiff's interpretation and granted plaintiff's motion for summary judgment. On appeal, defendant, like Southwest here, retreated from the stipulation and asserted that there was an issue of fact which barred summary judgment for the plaintiff. The court held that, having stipulated below that no fact issue existed, the defendant could not contend on appeal that fact issues did exist.

In *Tripp v. May,* 189 F. 2d 198 (7th Cir. 1951), defendant moved for summary judgment. At the hearing, plaintiff orally moved for summary judgment. Defendant stated there were no factual disputes and that he had no further evidence to offer. The trial court granted judgment to plaintiff. On appeal, the Seventh Circuit affirmed, although it agreed with the defendant's belated assertion that issues of fact existed. It affirmed because all the facts were in evidence before the court and the fair inference of the record was that the parties had submitted the issue to the court for determination. In the instant case, the court does not need to search the record to determine whether there was any acquiescence or implied waiver by conduct. The record in this case is clear. There was an express stipulation that the issues were submitted to the court for decision by the court. Under the rationale of *Gillespie, Demelle,* and *Tripp, supra,* Southwest cannot now claim that issues of fact exist.

Additionally, Westinghouse wishes to point out that the cases relied upon by Southwest in support of its argument have no relevance to this case. Much of Southwest's argument is based on the proposition that agreements of counsel on questions of *law* are not necessarily binding on the court (see, *e.g.,* Appellant's Brief, pp. 17, 25). Here Westinghouse and Southwest did not purport to bind the court by agreements on questions of law. They agreed on the *facts.* The issues of law were properly submitted to the court for its determination. Nor did the stipulation as to the facts operate to create a moot or fictitious case, such as was condemned in *Swift & Co. v. Hocking Valley R. Co.,* 243 U.S. 281, 37 S. Ct. 287, 61 L. Ed. 722 (1917), relied upon by appellant. Appellant's other cases, *Cram v. Sun Ins. Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967) and *Brawner v. Pearl Assurance Co.,* 267 F.2d 45 (9th Cir. 1958) simply stand for

the well known proposition that a party, by making a motion for summary judgment, does not impliedly concede that no fact issue is present if his legal theory is rejected. Those cases have nothing to do with the situation in which a party stipulates that no fact issue exists.

When Southwest, in its second Question Presented, poses the question of whether there was a meeting of the minds of the parties, it completely fails to take into account the express holding of the trial court that there was a meeting of the minds. The first stipulated question presented to the court was:

> "What warranty was extended by defendant to plaintiff in the sale of the machinery which is the subject matter of the suit?" (R. 1009).

Obviously to decide that issue, it is essential to determine what warranty the minds of the parties met on and the court did so. It expressly held:

> "that the applicable warranty upon which the sale of machinery was based and which establishes and limits the liability of the defendant and upon which there *had been and was a 'meeting of the minds' at all pertinent times,* is that referred to in Exhibit C-2 (the Westinghouse form of warranty) attached to plaintiff's answers to defendant's written interrogatories . . ." (Emphasis added.) (R. 1010).

Southwest's argument on the "meeting of the minds" issue as it appears in Appellant's Brief pp. 26-35 is not too clear to Westinghouse. Southwest first states that the factual question presented is whether the minds of the parties met on the terms and conditions of the Westinghouse proposal or of the Southwest purchase order (Brief, p. 29). Next, it is stated that it is "apparent" that the minds of the parties did not meet on either one, so the Uniform Com-

mercial Code should fill the void (Id., 29-30). It is next stated that the Westinghouse exclusion of consequential damages was not brought to the attention of Rust or Southwest and therefore did not become part of the contract (Id., 30-31). Finally, it is stated that if there was a meeting of the minds at one point, the agreement was later modified by adding to it the terms and conditions of the Southwest purchase order (Id., 32-35) under applicable provisions of the Uniform Commercial Code. Southwest then engages in a partial tracing of the chain of documents without mentioning the one that started it all in the first place—the Rust invitation to bid of May 3, 1960.

Southwest nowhere contends that the ruling of the trial court is unsupported by the stipulated evidence before the court or that, if the question is one of fact as now contended by Southwest, the finding is clearly erroneous. It is entirely based upon the unwarranted assertion that this is a summary judgment case. Under these circumstances, we believe all of Southwest's various positions on this aspect of the case can best be answered by quoting from the thorough opinion of the District Court. The court carefully spelled out its reasons for holding that the minds of the parties met on the terms and conditions of the Westinghouse warranty:

> "At all times in the negotiations and in the contract documents, and in the complaint itself, which alleges June 6, 1960, as the contract date, all of the parties operated on the assumption that the Westinghouse proposal and the Rust letter of intent, as confirmed by the Westinghouse order acknowledgment form, constituted the contract for the sale of the turbine generator unit. The conduct of the parties during the entire time and up to the filing on August 2, 1967, of plaintiff's 'Amendment of Complaint—July 29, 1967', cannot reasonably be explained on any other basis. By every objective test there was an agreement as to the

nature of the contract in effect and its terms and conditions and particularly as to the express warranty involved." (R. 982).

. . . .

"Other facts before the Court show that Rust was requested by Southwest in August or September, 1962, to extend the Westinghouse warranty. Rust and Westinghouse exchanged correspondence, the effect of which was that the replacement portion of the warranty would be extended, but that no blanket extension of the warranty could be made. A Southwest memorandum dated April 9, 1962, refers to documents that Southwest's attorney would like to have in preparing an insurance claim for the damages suffered at the mill. This memorandum refers specifically to the form of warranty contained in the Westinghouse order acknowledgment form that had by that time been received by Southwest.

"To the court these facts also show at these late dates that Southwest clearly confirmed their understanding that it was the Westinghouse form of warranty, limited in time and obligation, that was applicaable to the sale." (R. 995).

The court's opinion also dispels Southwest's present contention that the Westinghouse warranty was not brought to the attention of Rust or Southwest, even though that issue was not raised below:

"There were experienced purchasing departments, staffs of engineers, and legal departments available to all three companies. Rust has had great experience in purchasing electrical equipment from Westinghouse.

"The Rust letter of invitation appended a form of warranty specifically tailored for the Southwest contract. The form of warranty was, setting aside for the moment the consequential damage limitation, substantially the same as the Westinghouse warranty. When the Westinghouse proposal was received, a copy of it

was sent to Southwest. Southwest commented upon the proposal, made some technical suggestions, but made no comment or objection as to the form of warranty.

"The letter of intent set forth above refers generally to the Westinghouse proposal." (R. 1001).

. . . .

"All purchasing departments involved were familiar with the Westinghouse order and acknowledgment forms. Further, the reference to pages 4B and 5B of the original Westinghouse proposal containing the Westinghouse form of warranty by Rust when it changed its purchase orders to provide for erection services and installation of the turbine generator unit in a separate contract is significant as indicating the intentions and expectations of the parties. Other correspondence and testimony before the Court shows that as late as September, 1962, the parties had in mind the Westinghouse warranty with its one-year term, rather than the much broader Southwest warranty of indefinite duration." (R. 1002).

The trial court has also completely answered Southwest's present assertion that, assuming an original meeting of the minds, the contract was later modified by adding to it the terms on the back of the Southwest purchase order:

"Under the Code, therefore, there was a contract between the parties at the time of the Rust letter of intent.

"The effect of the July 6, 1960, Southwest purchase order is determined by section 2-207(2), and comments (2) and (3) thereto. The additional terms are to be construed as proposals for additions to the contract. The additional terms here, paragraphs (2) and (12) of the Southwest purchase order, never became a part of the contract because: (1) the original Westinghouse offer expressly limited acceptance to its terms; (2) the proposed additional warranty constituted a material alteration to the prior agreement; and (3) the

proposed terms were uncontrovertedly rejected by the Westinghouse stamp affixed to the face of the purchase order form that referred to a form of acknowledgment that Rust had previously received, confirming the warranty contained in the formal proposal and its covering letter, as to which there never was any objection." (R. 1003-04).

Westinghouse believes now, as both Westinghouse and Southwest believed at the time of trial, that, under Pennsylvania law, the question of what the contract was is one of law for the court to determine when the facts are undisputed. See *Reitmyer v. Coxe Bros. & Co.,* 264 Pa. 372, 107 A. 739 (1919); *Buff v. Fetterolf,* 207 Pa. Super. 92, 215 A.2d 327 (1965); *In re Home Protection Building & Loan Assn.,* 143 Pa. Super. 96, 17 A.2d 755 (1941). Southwest does not now challenge that proposition of law but, instead, seeks to remove its predicate by saying that the facts are disputed. Having stipulated they were undisputed, Southwest cannot now raise the issue on appeal and the ruling of the court should be affirmed. But even if the question were one of fact under Pennsylvania law, Southwest has shown no grounds for reversal.

By stipulation of the parties, the question of which warranty governed was unquestionably submitted to the court for decision. Southwest makes no suggestion that what it now contends to be a factual finding by the court is unsupported by the stipulated evidence nor does it contend that it is "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure. The trial court has rendered a thoughtful and detailed opinion fully explaining the reasons for its finding. Findings by a trial court are not reversible unless so "clearly erroneous" that the reviewing court is left with a "definite and firm conviction that a mis-

take has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). Southwest, as appellant, bears a heavy burden to show that such findings are clearly erroneous. *Pacific Queen Fisheries v. Symes,* 307 F.2d 700 (9th Cir. 1962). See also *Bowser, Inc. v. Filters, Inc.*, 398 F.2d 7 (9th Cir. 1968); *Clostermann v. Gates Rubber Co.*, 394 F.2d 794 (9th Cir. 1968); and *Home Indem. Co. v. Allstate Ins. Co.*, 393 F.2d 593 (9th Cir. 1968).

Southwest doesn't even attempt to show that the finding, which it contends to be factual in nature, is clearly erroneous. But even if this case were treated as a summary judgment case in the classic sense, which it most definitely is not, Southwest has failed to show grounds for reversal. It simply asserts that conflicting inferences exist. In support of its assertion, it simply points to the arguments of counsel which are nothing more than arguments concerning what legal result should follow given the undisputed stipulated facts. Southwest makes no real attempt to show that any conflicting inference it claims to exist could reasonably lead to any conclusion other than the one the District Court reached. No challenge to the following statement of the trial court, which was made when denying the post-trial motion to alter and amend, has been made:

> ". . . I cannot see that there could even be an inference [that the Southwest form of warranty controlled or was in the minds of the parties]. I mean even an inference has to be based upon something, and clearly from any objective tests as to what the subjective meeting of the minds was, it clearly shows that at all times from the invitation to bid until the day before the trial of the lawsuit years later, that it was clearly in the minds of Southwest that the Westinghouse form of warranty controlled." (T. Dec. 4, p. 26).

Westinghouse believes the foregoing unchallenged statement of the trial court is the best answer to Southwest's present argument, even accepting Southwest's unwarranted assertion that this case is a summary judgment case at all.

II. Southwest's Present Theory That the Westinghouse Warranty Was Unconscionable Presents No Reversible Error.

A. The Theory of Unconscionability Was Never Presented or Litigated Below and Should Not Be Considered on Appeal.

Southwest's third Question Presented relates to the alleged unconscionability of the Westinghouse exclusion of consequential damages. This theory was inserted into the case by Southwest after it had changed counsel following final judgment. It is wholly untimely. Under Southwest's principal theory, *i.e.,* that the Southwest warranty contained in the July 6, 1960 purchase order governed the case, it was wholly immaterial whether the Westinghouse warranty was abstractly unconscionable or not. Under its theory, the exclusion of consequential damages was not part of the agreement of the parties. Even in urging Southwest's alternative theory, *i.e.,* that even if the Westinghouse warranty governed, Pennsylvania law did not bar consequential damages, Southwest never contended that the exclusion was unconscionable. Southwest itself relied upon the Westinghouse warranty from the time it filed its suit in 1963 until August 2, 1967, without once mentioning that a portion of it was alleged to be unconscionable.

Southwest well knows that its present theory of unconscionability is untimely and goes to considerable effort (Appellant's Brief, pp. 36-38) to show that *Westinghouse* mentioned unconscionability below. Westinghouse's counsel did mention it, but only in pointing out that Sec. 2-719 of the Uniform Commercial Code expressly allowed such exclusions for commercial losses, whereas in cases involving

consumer goods such exclusions were *prima facie* unconscionable where personal injuries were involved. This argument certainly did not inject the issue of unconscionability into the case. There is no other reference in the record to unconscionability until after final judgment.* One thing is clear: in no pleading ever filed by Southwest was unconscionability alleged, even when Southwest relied upon the Westinghouse warranty. Only after Southwest changed attorneys and theories after final judgment was the issue of unconscionability injected. The District Court, in denying the motion to alter and amend, expressly noted that:

> "No offer was ever made to make any record supporting it, and I think in the context of this case these facts and these parties, the court could not say that there was a question of unconscionability upon which evidence should be taken particularly in the absence of any offer or claim by counsel to that effect." (T. Dec. 4, p. 26).

Everyone is entitled to his day in court. But at some point litigation must be terminated. Both parties to this lawsuit are substantial corporations and had the means to develop fully their respective theories. Each did so. Even after exhaustive discovery on the original theories selected by Southwest, the court allowed Southwest, on the day set for trial, to amend its theory and to start over. Southwest did this in the face of a motion for summary judgment and in obvious recognition of the fact that it was in serious trouble on its original theories. It saw a possible way out—to shift

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*On p. 36 of Appellant's Brief, a paragraph is quoted from a memorandum Southwest says it filed on August 11, 1967. The reference is to p. 1022 of the record. That page is a page of Southwest's motion to alter and amend filed September 18, 1967, and does not contain the quoted material. The record reflects no memorandum filed by Southwest on August 11 and Westinghouse has unsuccessfully searched the record before the District Court to find the quoted material.

to the theory that the Southwest purchase order of July 6, 1960 constituted the contract between the parties. Even though it was late in the proceedings, the trial court allowed the amendment believing that a litigant is entitled to put his best foot forward. Southwest did so. It lost. Now it wants to advance a new theory in the hope that it might prove more successful.

Courts everywhere recognize that a party is not entitled to litigate interminably on one theory after another. The sensible and well established rule is that a party may not raise on appeal issues and theories which he did not present or litigate below. This Court has applied this rule in a variety of cases.* The same consideration applies and the same rule governs when the new theory or issue, while asserted before appeal, comes only after judgment in the court below.† Indeed, even when the shift of theories comes before judgment in the trial court but after the case has been presented on another theory, it comes too late. See, *e.g.*, *Albrecht v. Herald Co.*, 367 F.2d 517 (8th Cir. 1966), *rev'd on other grounds*, 396 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968). The application of this universal rule of appellate practice prevents piecemeal litigation, tends to put an end to litigation and requires the parties to deal fairly and frankly with each other and with the trial court. See *Apex Smelting Co. v. Burns*, 175 F.2d 978, 982 (7th Cir.

***Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968), *Roberson v. United States*, 382 F.2d 714 (9th Cir. 1967), *Pacific Queen Fisheries v. Symes*, 307 F.2d 700 (9th Cir. 1962), *Inman-Poulson Lumber Co. v. Commissioner of Int. Revenue*, 219 F.2d 159 (9th Cir. 1955), *United States v. Waechter*, 195 F.2d 963 (9th Cir. 1952), and *Wilson v. Byron Jackson Co.*, 93 F.2d 572 (9th Cir. 1937).

†*Cleary v. Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir. 1960) and *Royal Indem. Co. v. Olmstead*, 193 F.2d 451 (9th Cir. 1951); 3 *Barron & Holtzoff/Wright, Federal Practice and Procedure*, § 1304 (1958); 6A *J. Moore, Federal Practice*, ¶ 59.07 (Rev. ed. 1966).

1949). For these reasons, this Court should not consider or decide the issue of unconscionability.

B. Even Assuming Southwest's Theory of Unconscionability Were Properly Here for Consideration, Southwest Has Shown No Reason for Reversal on That Theory.

Southwest phrases its question on this point as follows:

> "When an unconscionable exculpatory clause, which was not brought to the attention of a party, fails in its essential purpose and operates to deprive the party of a substantial value of the bargain, is such an exculpatory clause unconscionable under the *Uniform Commercial Code?*" (Appellant's Brief, p. 14, 36).

It is immediately apparent that this question contains factual assumptions which contradict the record. It assumes the Westinghouse warranty is in fact unconscionable, that it was not brought to the attention of Southwest, that it somehow deprived Southwest of the benefit of its bargain, and then poses the question of whether the clause is unconscionable under the Uniform Commercial Code. A mere reading of those portions of the court's opinion quoted above completely dispels the erroneous statement that the warranty was not brought to the attention of Southwest and also shows that Southwest got exactly what it bargained for. Calling something unconscionable doesn't make it unconscionable. Had Southwest alleged unconscionability, the provisions of Sec. 2-302(2) of the Uniform Commercial Code would have been brought into play. That section provides:

> "(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Southwest never requested a hearing on unconscionability, *even after trial.*

Southwest seems to be arguing that the Westinghouse warranty is unconscionable as a matter of law under the Uniform Commercial Code. It has no cases supporting such a proposition and obviously could have none since the Uniform Commercial Code, Sec. 2-719(3) expressly authorizes the exclusion of consequential damages. Except in the case of personal injuries caused by consumer goods, such exclusions are not prima facie unconscionable. If Southwest is claiming that exclusions of consequential damages for commercial losses are automatically unconscionable, as a matter of law, the argument is easily answered by the plain language of Sec. 2-719(3).

Sec. 2-302(2) of the Uniform Commercial Code indicates the question of unconscionability is one of fact for the court to decide based on all the circumstances and the commercial setting of the sale. Southwest has already stipulated that it has no more evidence on the question of which warranty governs, which necessarily includes the question of whether any portion of the governing warranty should be excluded as unconscionable. Southwest, in support of its post-trial motion which first raised the issue of unconscionability, avowed to the court that it had no more factual evidence on the point of which warranty governed and expressly denied that it was asking the court to reopen the case to take more evidence (R. 1134). Southwest then, in an astounding reversal, argues that it "was denied the opportunity to present evidence as to its [the Westinghouse warranty] commercial setting" (Appellant's Brief, p. 46). Superimposed on all of these superfluities is Southwest's argument that the issue of unconscionability really is properly here for decision because it was in fact *tried by the court* below (Appellant's Brief, p. 38). If this be so, the

court obviously upheld its conscionability. Southwest makes no claim that the court's finding is clearly erroneous and has therefore not created an issue requiring reversal.

The cases submitted by Southwest in support of its argument add nothing to its argument. They are *Jarnot v. Ford Motor Co.,* 191 Pa. Super. 422, 156 A.2d 568 (1959) (overruled on another point in 422 Pa. 383, 221 A.2d 320 at 325 (1966); *Cox Motor Car Co. v. Castle,* 402 S.W.2d 429 (Ct. App. Ky. 1966); *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); and *Armco Steel Corp. v. Ford Constr. Co.,* 237 Ark. 272, 372 S.W.2d 630 (1963). None of them involves a claim of unconscionability. The *Cox Motor Co.* case and the *Armco* case both expressly point out that exclusions of consequential damages are proper. *Seely* and *Jarnot* did not involve warranties which excluded consequential damages.

Southwest makes one additional assertion that requires response. It now claims that the allegations of its antitrust count (which was severed for trial) may make the contract unconscionable. This argument is wholly new on appeal— it wasn't even raised in the motion to alter and amend the judgment. Southwest cites no case remotely indicating that an unconscionable price provision, if proven, should, as a matter of law, make unconscionable a separate warranty provision. Sec. 2-302(1) of the Uniform Commercial Code certainly does not dictate such a result.

The whole issue of unconscionability is simply not properly here for review. If it were, Southwest has shown no error in its presentation of its Question III. Surely the exclusion is not unconscionable as a matter of law since the Uniform Commercial Code expressly authorizes such exclusions. If Southwest has no more evidence on the point as it has stated, there is no error since the record certainly doesn't compel a finding of unconscionability. If the issue

of unconscionability was in fact tried by the court, as Southwest has also contended, Southwest has failed to show or even to claim that the court's finding was clearly erroneous.

III. Under Pennsylvania Law, the Agreement of the Parties Excluding Consequential Damages Precludes Recovery of Such Damages for Negligence as Well as for Breach of Warranty.

Southwest phrases its question IV as follows:

> "When the record on appeal affirmatively shows that Westinghouse was negligent in the manufacture and repair of the steam turbine generator unit, then was it proper for the court to grant Westinghouse' motion for summary judgment against Southwest on the theory of negligence, when Southwest had established a prima facie case in negligence?"

Again, we are compelled to point out what the record in this case is and what actually occurred below. The "record on appeal" to which Southwest now refers in Question IV, is a "Summary of Depositions" gratuitously inserted as Appendix 2 of Southwest's brief. It is Southwest's interpretation of a few passages in a few of the many depositions taken. No part of this "Record on Appeal" is in the stipulated record upon which the trial court decided this case. While Southwest's present counsel may think that it is "imperative that the Court be informed of the contents of a few portions of the multitude of depositions" (Appellant's Brief, p. 52), Southwest's trial counsel did not. The reason is simple. At trial, it was agreed and understood that the two stipulated questions presented to the court would dispose of the entire case if the court ruled in favor of Westinghouse on both of them, whether or not other evidence tending to show negligence on the part of Westinghouse existed. The court first decided that the governing warranty was the Westinghouse warranty. The court then decided that, under

applicable Pennsylvania law, the warranty language excluded consequential damages on a theory of negligent breach of warranty. The cases relied upon by the court in making this ruling are collected at R. 1006. Even now Southwest makes no attack upon this ruling or the cases cited, so we will not lengthen this brief with an unnecessary discussion of Pennsylvania law to show that the court was clearly correct in its ruling. Under the theory of the case as it was tried, the court's ruling on the two agreed questions disposed of the case and Southwest never contended at that time that it did not.

What Southwest now seems to be arguing is that Arizona law created an independent tort liability, wholly apart from any contract, by which Southwest may recover consequential economic losses for the alleged negligence of Westinghouse in manufacturing and repairing the unit. The trial court did note in passing that such a theory would not allow recovery to Southwest (R. 983). But Southwest had already conceded that point. Its present argument again completely ignores the posture this case was in when it was decided.

Southwest repeatedly represented to the court below that no duty was owed by Westinghouse to Southwest other than that created by contract, whatever that contract was. It characterized its whole negligence theory as one of "negligent breach of warranty." In fact, the principal argument advanced by Southwest in support of its last-minute motion to reallege its warranty count was that Westinghouse would not be prejudiced by the amendment since, even under the negligence count, Southwest would have to prove a contract in order to create any duty on Westinghouse which could result in liability.

In its memorandum in support of its motion to amend, Southwest asserted that Westinghouse "is mistaken in be-

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In its memorandum in support of its motion to amend, Southwest asserted that Westinghouse "is mistaken in be-

lieving that plaintiff has abandoned its claim for breach of warranty." (R. 852). Southwest stated:

> "Although the pleading [old Count One] sounds in tort, the relationship between the parties is based upon contract. Plaintiff must prove the contract and its terms in order to establish the relationship between the parties out of which defendant's duty arises." (R. 853).

Southwest repeatedly asserted, in oral argument on the motion to amend, that its theory was still one of contract (T. Aug. 1, pp. 1-6, 22-23). Following the allowance of the amendment, in resisting Southwest's renewed motion for summary judgment Southwest did not argue any tort theory independent of contract and expressly argued that any duty on Westinghouse necessarily had to be based on a contract (T. Aug. 7, pp. 24-33). Southwest simply argued that it relied on its form of warranty, that the Westinghouse limitation was not part of the contract between the parties, and that evidence of the Westinghouse limitation was barred by the parol evidence rule.

Then at the trial, the parties stipulated to the two issues to be submitted to the court with the clear understanding that they disposed of the entire case if both were decided favorably to Westinghouse. In arguing the case on August 11, Southwest argued mainly that its form of warranty applied. It further argued that even if the Westinghouse warranty applied, it would not bar recovery on a negligence theory under Pennsylvania law. But it certainly did not argue, as Southwest now apparently does on appeal, that Arizona law created an independent tort duty, wholly apart from any contract, which would impose liability upon Westinghouse for alleged negligent manufacture and repair of the unit. The only possible reference to an independent tort duty was when Southwest's counsel claimed that if Westing-

house was negligent in the flushing procedures during erection of the unit, Westinghouse might be liable to Southwest under a theory of trespass (A.T. 277). However, this argument was quickly dispelled when it was pointed out that Rust had the responsibility of erecting the mill, that the contract for the services of a Westinghouse engineer to provide advice during erection was between Rust and Westinghouse and that Southwest never claimed or pleaded any third party beneficiary theory (A.T. 279-82). Certainly nothing was said about any independent duty relative to the manufacture or repair of the unit.

After the court decided the case, it expressly made inquiry as to whether there was anything further to be done of record (A.T. 286, 288). Southwest did not then claim that any theory of the case remained alive. The court also noted both in its opinion (R. 983) and its order and judgment (R. 1010) that there was no evidence before the court that Westinghouse had failed to perform its affirmative warranty duties of repair or replacement. Southwest said nothing. Nor did it in its later objection to the form of judgment. (R. 976). Southwest, having repeatedly represented to the court that it was relying on a contract to create a duty between Westinghouse and Southwest, and having tried the case on that theory, is not now in a position to shift its theory on appeal. Again, we refer to the authorities collected in Sec. II-A of the argument section of this brief.

Even if Southwest could now urge such a theory, it has failed to show the legal validity of such a theory. Southwest relies upon and discusses at length two cases dealing with sales of equipment, *Pipewelding Supply Co., Inc., v. Gas Atmospheres, Inc.*, 201 F. Supp. 191 (N.D. Ohio 1961); and *Asphaltic Enterprises, Inc., v. Baldwin-Lima-Hamilton Corporation*, 39 F.R.D. 574 (E.D. Pa. 1966). The discussion

of those two cases by Southwest, given the context in which the issue was presented and decided below, is incomplete. In the first place, both cases involve the application of *New York* law prior to the adoption by that state of the Uniform Commercial Code. The *Pipewelding* case expressly held that the exclusion of consequential damages contained in the warranty there involved barred plaintiff's claim in warranty but that, under the law of *New York,* the limitation of liability was not effective as an exemption of liability for negligence. 201 F. Supp. at 199. In the instant case, Pennsylvania law governs and Southwest does not challenge the correctness of the trial court's ruling that it bars recovery for negligent breach of warranty.

In the *Asphaltic Enterprises* case, the only thing the court determined was that plaintiff had stated a claim, for purposes of a motion to dismiss, by alleging an express warranty, a breach thereof and resulting damages. The motion to dismiss referred to a provision in the sales agreement excluding liability for consequential damages. The court expressly recognized that parties can exclude consequential damages. But since defendant did not deny that there was in fact a breach of the express warranty, the court simply held plaintiff had stated a claim. In doing so, however, the court indicated it had grave doubts that plaintiff could recover since the damages alleged were consequential. But, noting the rule that plaintiff is entitled to any type of relief to which he may ultimately be shown to be entitled, the court denied the motion.

Here there clearly was no duty on Westinghouse to manufacture or to repair the unit in the absence of the contract. The contract expressly covered those points. Therefore, even under the Arizona case of *McClure v. Johnson,* 50 Ariz. 76, 69 P.2d 573 (1937), now relied upon by Southwest, the action sounds in contract. The other case cited by Southwest,

Apache Railway Co. v. Shumway, 62 Ariz. 359, 158 P.2d 142 (1945), a death action under the Federal Employees' Liability Act, is wholly inapplicable.

Nor has Southwest made any showing, as a matter of Arizona or general tort law, that recovery is available for its claimed economic losses as a result of a pure tort theory unrelated to some contractual obligation. There is no Arizona decision allowing recovery on a theory of negligent infliction of economic loss. The Restatement is most persuasive in the Arizona courts in determining matters as to which no Arizona case law has developed. *See, e.g., Rodriguez v. Terry,* 79 Ariz. 348, 290 P.2d 248 (1955); *Matland v. United States,* 285 F.2d 752 (3rd Cir. 1961). There is nothing in the Restatement *(Second)* of Torts to support recovery on the present undisputed facts. Its provisions as to the liability of persons supplying chattels for the use of others, Secs. 388 *et seq.,* extends the liability of such a person only to cases where *physical harm* is caused by the use of the chattel. This same limitation expressly appears in Sections 388, 389 and 390 and is also incorporated by reference into the later sections of that topic.

Courts in jurisdictions other than Arizona have refused to allow recovery on theories of negligent interference with contract, negligent interference with prospective advantage, or negligent infliction of economic loss.* Recovery is denied in such cases because the damages suffered are too remote, uncertain, or disproportionate to culpability.† The treatises

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*See, *e.g., Byrd v. English,* 117 Ga. 191, 43 S.E. 419 (1903); *Stevenson v. East Ohio Gas Co.,* 47 Ohio L. Ab. 586, 73 N.E.2d 200 (1946); *Ultra Mares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931); *Polo v. Edelbrau Brewery,* 185 Misc. 775, 60 N.Y.S. 2d 346 (App. Term 1945).

†See, *e.g., The Federal No. 2,* 21 F.2d 313 (2d Cir. 1927); *Northern States Contracting Co. v. Oakes,* 191 Minn. 88, 253 N.W. 371 (1934); *Brink v. Wabash R. R. Co.,* 160 Mo. 87, 60 S.W. 1058 (1901); *Cain v. Vollmer,* 19 Ida. 163, 112 P. 686 (1910); *City of Oxford v. Spears,* 228 Miss. 433, 87 So.2d 914 (1956).

confirm that such losses, to be compensable, must result from an intentional tort. See W. Prosser, *Torts,* Sec. 106-07 (2d ed. 1955); 1 F. Harper & F. James, *Torts,* Sec. 6.10, at 509-10 (1956).

In summary of Southwest's argument on its fourth question: 1) the case was tried on the theory that a contract was necessary to impose any duty on Westinghouse; 2) the court held that, under Pennsylvania law, the warranty language barred recovery on a theory of negligent breach of warranty and Southwest does not here challenge that ruling; 3) to the extent Southwest now seeks to impose liability for consequential economic loss on a pure tort theory absent any contractual arrangement, the claim comes too late but is, in any event, not meritorious under principles of tort law.

IV. Southwest's Present Theory That Some Portion of Its Damages Are "Incidental" Rather Than "Consequential" Presents No Reversible Error.

A. The Theory of "Incidental" Damages Was Never Presented or Litigated Below and Should Not Be Considered on Appeal.

Southwest does not attempt to show that its present theory of incidental damages was timely presented below, but merely suggests that "Southwest may have computed their damages through the use of an improper measure of damages" (Appellant's Brief, p. 62). This theory is purely an afterthought. Had the court accepted Southwest's primary position at trial, it would have made no difference how its damages were characterized. Its warranty covered any and all types of damages.

By everything Southwest did and said in this case, it cannot now be permitted to advance this theory on appeal. To show how grossly untimely this theory is and how contradictory it is to Southwest's earlier position, it is only

necessary to refer to some of the history of this litigation which bears on the point: 1) Early in the case Westinghouse asked Southwest by interrogatory to itemize its consequential damages (R. 24). Southwest responded, characterizing all of its alleged damages as consequential, and giving a breakdown thereof (R. 64). 2) The motion for summary judgment directed to Southwest's strict liability in tort theory was based, in large part, upon the proposition that Southwest could not recover consequential economic damages under such a theory (R. 700-19). This motion was thoroughly briefed. At no time did Southwest contend its damages were not consequential. 3) The motion for summary judgment on the warranty count had, as its principal point, the argument that Southwest could not recover consequential damages because the Westinghouse form of warranty excluded such damages (R. 720-32). In the face of this, Southwest, without mentioning incidental damages, abandoned its warranty count. 4) When Southwest amended its damage interrogatories after the pretrial, it again expressly characterized them as consequential (R. 789). 5) The motion for summary judgment on the negligence count was based on the point that damages of the type Southwest was claiming could not be recovered under that theory (R. 808-24). Southwest responded to that motion and argued it, again without reference to incidental damages (R. 852-62). 6) When Southwest sought to reinstate its warranty count and to rely upon the Southwest purchase order of July 6, 1960, Southwest's counsel argued, in support of the motion to amend, that Westinghouse would not be prejudiced by the amendment because "They [the damages] obviously are consequential and have been all along" (T. Aug. 1, p. 21) and that "the damages claimed are those damages which the courts characterize as consequential damages." (T. Aug. 1, p. 21-22). 7) When the renewed motions for summary

judgment were argued the day before the trial on the ground that the Westinghouse warranty applied and excluded consequential damages, no mention was made by Southwest of any claim for incidental damages (T. Aug. 7, pp. 24-33). 8) After the trial began and the parties agreed to submit the issues to the court for decision, the second stipulated question was

> "Under the warranty found as a matter of law, is defendant liable to plaintiff for the claimed consequential damages?" (R. 1009)

9) When the parties argued the case at length on August 11, no reference was made by Southwest to incidental damages (A.T. 261-79). 10) When the court ruled that the Westinghouse warranty applied, it expressly noted that, "there's no question by stipulation of counsel that these are what are legally termed consequential damages." (A. T. 286). Southwest did not deny such a stipulation. 11) Following the ruling of the court a formal order and judgment as well as a detailed opinion, both of which referred expressly to consequential damages, were prepared and filed by the court (R. 978 and 1008). Southwest objected to the proposed form of judgment but again did not refer to incidental damages (R. 976).

Only after Southwest had changed attorneys after final judgment did the theory of incidental damages come into the picture. It was asserted in the motion to alter and amend that the judgment was erroneous because *Westinghouse* had failed to show as a matter of law that not all of Southwest's damages were consequential! The trial court expressly made note of the fact, ruling on the post-trial motion, that the theory of Southwest throughout all prior proceedings had been that its damages were consequential in nature (T. Dec. 4, p. 26).

By its own selection of theories and its stipulations and conduct, Southwest should now be barred from asserting this theory. It would be hard to imagine a case in which a theory is more untimely or more contradictory to the position taken by a party throughout the case. The same considerations and the same authorities submitted above in connection with the untimeliness of the theory of unconscionability apply here. The court need not and should not consider this theory.

B. Even Assuming Southwest's Theory of "Incidental" Damages Were Properly Here for Consideration, Southwest Has Shown No Error Because Its Claimed Damages Are Not Incidental Damages.

By the time of trial, Southwest had amended its damage claim to approximately $2,530,000 (R. 789 *et seq.*). Practically all of that amount was calculated by taking a daily overhead figure for the mill of $31,403, and charging to Westinghouse a proportion of that amount for each day in which the mill's actual production was less than the mill's alleged rated daily capacity. The proportion of daily overhead charged was the proportion which actual production bore to rated production capacity. This item of claimed damage amounted to approximately $2,450,000 of its total claim of approximately $2,530,000. The balance of the claim was for the expense of solid caustic allegedly purchased to offset recovery boiler loss plus some extremely miniscule repair costs (approximately $2,300).

Sec. 2-715(2) of the Uniform Commercial Code defines consequential damages as including "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; . . ." Sec. 2-715(1) of the Uniform Commercial Code defines incidental damages as including "expenses reason-

ably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."

Southwest's alleged overhead expense loss of approximately $2,450,000 constituted by far the greatest portion of the damages claimed. Southwest accepts the fact that those expenses are consequential in nature and does not argue in its brief that they are incidental. The caustic expense also clearly is consequential by reason of the definition of Sec. 2-715(2) set forth above. That leaves the claim for alleged repair which is a mere $2,300 out of a claim of approximately $2,530,000. Assuming the repair expenses fell within the definition of incidental damages, no one would have considered trying this case for that claim, even if Southwest had then claimed those damages were incidental and even if the court would have relieved Southwest of all its avowals and stipulations that all its damages were consequential. The repair claim was not in the minds of the parties at all. But had the case gotten to a consideration of it, there is an independent reason why Southwest could not recover even if the damages were characterized as incidental. The Westinghouse warranty provided in part

> "such correction [of defect or defects in workmanship or material which may develop under proper or normal use during the period of one year from the date of shipment by repair or by replacement f.o.b. factory of the defective part or parts] shall constitute a fulfillment of all Westinghouse liabilities in respect to said apparatus, unless otherwise stated hereunder. Westinghouse shall not be liable for consequential damages." (Ex. DDD, App. 13).

Throughout the District Court proceedings Westinghouse relied upon Section 2-719(3), which permits consequential damages to be limited or excluded, since Southwest had agreed its damages were all consequential. Sec. 2-719(1)(a), however, also permits the limitation of alteration of "the measure of damages *recoverable under this Article,* as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming good or parts;. . ."

The limitation or alteration of the measure of damages permitted by Sec. 2-719(1)(a) is far more general than the specific reference to the limitation or exclusion of consequential damages provided in Sec. 2-719(3). A limitation in accord with Sec. 2-719(1)(a) was provided in the phrase of the Westinghouse form of warranty stating that "such correction shall constitute a fulfillment of all Westinghouse liabilities." Therefore whether Southwest's damages are considered "consequential" or "incidental" still remains immaterial, even if the question were properly here.

V. The Doctrine of Strict Liability in Tort Is Inapplicable to This Case.

At last we reach an issue in this case which was presented to the trial court, was ruled upon by the trial court and is legitimately here for review and decision. Southwest did allege, by amendment to its complaint, a theory of strict liability in tort. Following discovery, Westinghouse moved for summary judgment on that count. The court granted it. Westinghouse submits the court was right. The court stated that it granted the motion because:

> ". . . the principles underlying the doctrine of strict liability in tort for defective products were not applicable. All damages sought by Southwest in this case are consequential damages. The turbine generator unit is a highly specialized, custom-built piece of ma-

> chinery, built to particular specifications and tested in the factory before delivery, under supervision of engineers representing both parties.
>
> "The circumstances of this case do not bring the plaintiff within the class of consumers, type of transaction, or damages suffered that created the need for relief based on strict liability in tort. Neither the philosophy nor the theory of the doctrine of strict liability in tort nor the actual holdings of the cases involved support an extension of the doctrine of strict liability in tort to the present facts." (R. 981-82).

At the time the motion for summary judgment was briefed, argued and granted, the damages claimed by Southwest consisted of the following items: excess of Southwest's costs (excluding depreciation) over sales, interest expenses, general and administrative expenses, loss of revenue and profits, interest on additional borrowings, cost of a certain contract for electrical power, and loss of proceeds on a stock subscription.* As to the strict liability in tort theory, the parties agreed that Arizona law applied.

Southwest devotes a considerable portion of its argument to the proposition that Arizona has adopted the doctrine of strict liability in tort. With this, Westinghouse has no quarrel. Although no state decisions had adopted the doctrine in Arizona at the time the District Court granted the motion, two Arizona cases, *O. S. Stapley Co. v. Miller,* 6 Ariz. App. 122, 430 P.2d 701 (1967), and *Bailey v. Montgomery Ward & Co.,* 6 Ariz. App. 213, 431 P.2d 108 (1967), were decided before the court's formal opinion was pre-

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*After the motion was granted Southwest amended its answers to interrogatories which modified, in some respects, Southwest's damage claim. However, all damages were still characterized by Southwest as consequential and Southwest did not claim that the amendment of damages required any reconsideration of the summary judgment previously granted on the strict liability in tort theory.

pared and were taken into account by it (T. 998, App. 70). These decisions confirm the correctness of the District Court's ruling.

The question is not whether Arizona has adopted the doctrine, but whether the doctrine has any applicability to this case. Southwest makes no analysis of the cogent reasons which led the trial court to rule as it did and cites no single case which supports its argument that strict liability in tort should apply in this situation. It relies *solely* upon the dissent of Justice Peters in the California case of *Seely v. White Motor Company,* 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965). An analysis of the doctrine and the rationale which led to its adoption demonstrates that the doctrine is inapplicable to the case at bar.

In *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962), and *Vandermark v. Ford Motor Company,* 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), the leading cases developing strict liability, the doctrine's purpose was declared to be that the cost of *personal injuries* should be borne by responsible manufacturers rather than by injured consumers powerless to protect themselves. The Arizona court in *Stapley, supra,* following *Greenman* held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, *proves to have a defect that causes injury to a human being,*" (emphasis added) 430 P.2d at 706. The Arizona court approvingly cited *Rossignol v. Danbury School of Aeronautics,* 154 Conn. 549, 227 A.2d 418, 424 (1967) in which the Connecticut court, applying the elements set forth in Restatement (Second) Torts Sec. 402(A), required as a basis for recovery that the defective product cause "physical harm to the consumer or user or to his property." The Arizona *Bailey* case also involved personal injury to an individual consumer. More recently, *Tucson Gen. Hosp. v. Russell,* 7 Ariz.

App. 193, 437 P.2d 677, 681 (1968), has expressly approved the Restatement, Torts (Second) Sec. 402(A) definition of strict liability. It is:

> "One who sells any product in a defective condition *unreasonably dangerous to the user or consumer or to his property* is subject to liability *for physical harm* thereby caused *to the ultimate user or consumer or to his property* [upon certain conditions]." (Emphasis added.) Restatement, Torts (Second), Sec. 402(A).

The Comments to this section repeatedly limit the scope of strict liability in tort to physical harm to consumers or their property. For example, see Comment (b): "physical harm to the consumer or his property," Comment (d): " 'physical harm' in the form of damage to the user's land or chattels," and Comment (f):

> "The basis for the rule [of strict liability in tort] is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."

In *Seely v. White Motor Co.,* 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), the California Supreme Court, which originally promulgated the doctrine, expressly limited it to physical injuries to persons or property. Even Justice Peter's dissent would not apply the doctrine to the Westinghouse-Southwest sale because it would extend recovery only to consequential losses suffered by individual consumers. But the plain fact is that the courts have been following the view expressed by the court in the *Seely* opinion and not the dissent. See, *e.g., Price v. Gatlin,* 241 Ore. 315, 405 P.2d 502 (1965); *Ford Motor Company v. Lonan,* 217 Tenn. 400, 198 S.W.2d 240 (1966); *Brewer v.*

Reliable Automotive Co., 49 Cal. Rptr. 498 (D. Ct. of App. 1966); *Dealers' Transport Co. v. Battery Dist. Co.*, 402 S.W. 2d 441 (Ky. 1966).

No personal injury is involved in this case. No claim for damage to Southwest's property was made.* Southwest never contended that the turbine generator was unreasonably dangerous to persons or property. Their contention is solely that it did not perform according to Southwest's alleged expectations.

Southwest is not a consumer of the type the doctrine seeks to protect from personal injury. The assets of the Snowflake Division alone were in excess of $37,000,000 in 1962 and in excess of $41,000,000 in 1964 (R. 137). The Snowflake mill alone employed 426 persons in July, 1964 (R. 55). The turbine generator unit's purchase was not a casual over-the-counter transaction. This is not the case of an individual consumer buying a standard product and being entirely dependent upon the skill and judgment of the seller as to its safety. Negotiations for the purchase of the generator and development of the electrical requirements of the mill were extensive, required substantial time, and were accomplished in a purely commercial context between corporations of substantial size. They were initiated and implemented by Rust, a highly skilled specialized agent of Southwest. A 25,000 kilowatt turbine generator unit, as the District Court found, is a custom built, highly complicated machine, whose specifications were tailored on an individual basis to the purchaser's requirements after a full analysis of the anticipated electrical needs had been made

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*Southwest now advances an argument (Appellant's Brief, p. 67) that there was in fact physical damage done to plaintiff's property in that a cylinder wall and piston were scored and some armature bars were damaged. Southwest did not and does not now seek damages for a scored piston and cylinder or armature bars.

by Rust. Engineers from Rust and Westinghouse together supervised the factory bench tests (R. 981).

No court has ever held that recovery based on strict liability under the circumstances of this case should be allowed. The doctrine has been unanimously limited at some point short of the present facts. The Arizona court, which had followed California cases on the doctrine, would certainly follow *Seely, supra.* The *Seely* case provides a complete answer to Southwest's contentions in this case, for as the trial court correctly stated:

> "The *Seely* opinion, *supra,* [*Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965)] makes it plain that the law of warranty recovery for economic loss has not been entirely superseded by strict liability in tort in a commercial setting, that it is inappropriate to hold a manufacturer responsible for the quality of performance of its products in a purchaser's business unless it agrees that the product was designed to meet the purchaser's demands, and that the risk that the product will not meet the purchaser's economic expectations may fairly be charged to the purchaser unless the manufacturer agrees it will bear that risk. There was no such agreement in this case." (R. 996).

Given the facts and circumstances of this case, the nature of the transaction and the type of damages claimed, Westinghouse submits the trial court was clearly correct in ruling that the doctrine of strict liability in tort was inapplicable.

VI. By Southwest's Election, the Question of Whether Implied Warranties Ran with the Sale or Were Excluded by the Language of the Westinghouse Warranty Was Not Presented or Decided Below and Should Not Be Considered Here.

Southwest phrases its last question as follows:

> "When a seller has not disclaimed express and implied warranties, can the seller effectively disclaim express

> and implied warranties given by merely restricting the damages and remedies of the buyer without complying with the precise requirements for disclaimer of express and implied warranties as provided for in the *Uniform Commercial Code?*"

The argument advanced by Southwest in support of this question is wholly new on appeal. It was not even raised in the post-trial motion to alter and amend. Irrelevant abstract questions of law or fact should not be decided in the complete absence of a record and without benefit of a trial court's initial determination. Westinghouse believes it would be most inappropriate for the court to consider the question presented above.

First of all, Southwest's argument is again based upon a complete reversal of the position it took at trial. At trial, Southwest elected to rely primarily on its theory that the governing warranty was not the Westinghouse warranty but was the Southwest warranty. Its alternative theory was that if the Westinghouse warranty applied, Pennsylvania law should not be so construed as to bar its claim for consequential damages. It never presented a claim for non-consequential damages under any asserted implied warranty. Therefore, the court never had occasion to consider or determine the question of whether the language of the Westinghouse warranty effectively excluded all implied warranties. Secondly, the argument is based upon the unfounded and unsuggested assumption that the Westinghouse warranty is in fact unconscionable. Thirdly, it superimposes a new assumption: that the Westinghouse warranty was inconspicuous, a matter which has never been mentioned below. We merely note that it was not so inconspicuous but that the court found the parties' minds had expressly met and agreed upon its terms and conditions.

Fourthly, the Southwest argument ignores the provisions of the Uniform Commercial Code. Southwest equates exclusions of consequential damages with disclaimers of implied warranties. They are two different things. Exclusion of consequential damages is provided for by Sec. 2-719, "Contractual Modification or Limitation of Remedy" which provides, in subsection (3):

> "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Disclaimers of implied warranties are dealt with in Sec. 2-316 (2) which provides:

> "Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof'."

Subsection (3) of 2-316 provides certain exceptions to the requirements of subsection (2):

> "(3) Notwithstanding subsection (2)
>
> "(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> "(b) when the buyer before entering into the contract has examined the goods or the sample or model

as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

"(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

What Southwest is really asking this court to do is to amend the Uniform Commercial Code to provide that a seller may never exclude consequential damages unless he complies with the requirements of the Code relating to the complete disclaimer of all express and implied warranties. The authors of the Code and the Pennsylvania legislature provided that parties dealing in a commercial context could agree to exclude or allocate damages, whether or not they also agreed to exclude all express and implied warranties.

Had Southwest elected to proceed against Westinghouse for non-consequential damages for breach of implied warranties, the trial court would then have to have decided whether the language of the Westinghouse warranty did or did not exclude implied warranties, assuming Westinghouse asserted that it did. In that event, it may well have been necessary to take evidence to see whether the exceptions of Sec. 2-316(3) applied, assuming the court first held that implied warranties were not otherwise excluded under Sec. 2-316(2). Evidence that Rust examined and inspected the machine during manufacture and witnessed tests of it would have become relevant. Evidence relative to course of dealing, course of performance, and usage of the trade would have to be considered. None of these questions was determined and no evidence was taken. None was necessary under Southwest's theory. The issue was first raised on appeal. It cannot be decided in a vacuum. Southwest has shown no error on this point.

CONCLUSION

The doctrine of strict liability in tort was correctly held to be inapplicable to this case. The remaining theories now presented by Southwest were not timely preserved for appeal and are, in many instances, contradictory to Southwest's earlier theories and should not now be considered. Assuming, *arguendo,* that Southwest had properly preserved them for appeal, Southwest has failed to carry its burden of showing reversible error. The judgment should be affirmed.

Respectfully submitted,

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November, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES MOELLER